Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1980

No. 80-1960

DAVID WILLSON,
*Appellant,*

v.

STATE PERSONNEL BOARD, DEPARTMENT OF GENERAL SERVICES, STATE OF CALIFORNIA,
*Appellees.*

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT

# MOTION OF APPELLEES TO DISMISS OR AFFIRM

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IN

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ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT

## MOTION OF APPELLEES TO DISMISS OR AFFIRM

The appellees, State Personnel Board, Department of General Services and State of California respectfully move to dismiss or affirm the judgment of Court of Appeal of the State of California for the Third Appellate District pursuant to Rule 16 of the Supreme Court of the United States.

## STATEMENT OF THE FACTS

The appellant was absent without leave from his em-

ployment as a building maintenance worker with the Department of General Services of the State of California in Sacramento, California for seven (7) consecutive working days encompassing March 30, 31, and April 3, through 7, 1978. Said absence without leave created an automatic resignation from State service in accordance with the provisions of section 19503 of the California Government Code.

Section 19503 provides that a former employee may request reinstatement, under certain limited procedures. The section states that reinstatement may be made *only* if the employee makes a satisfactory explanation to the Board as to the cause of his absence and his failure to obtain leave therefor, and the Board finds that he is ready, able, and willing to resume the discharge of his duties of his position or, if not, that he had obtained the consent of his appointing power of a leave of absence to commence upon reinstatement. The appellant filed a request for such reinstatement. Under Rule 67 of the rules promulgated by the State Personnel Board, any such filing is automatically referred to a hearing officer for hearing or investigation without hearing as appropriate. In this case the appellant was granted a hearing before an administrative officer of the Board on May 22, 1978.

At the administrative hearing, the appellant stipulated that he had been absent without leave for seven (7) consecutive working days but proceeded to offer evidence in mitigation. Appellant testified that he took the time off in order to salvage lumber out of town for a

profit. After considering the evidence presented at the hearing, the hearing officer found that the appellant had not made a satisfactory explanation of the reason for his absence nor a satisfactory explanation of the reason for his failure to obtain leave to cover the full period of his absence. On that basis, the petition for reinstatement after automatic resignation by the appellant was denied.

Appeal from the denial of the request for reinstatement was taken under section 1094.5 of the California Code of Civil Procedure. Respondents prevailed on the merits and the petition for writ of mandate was denied. Appeal was taken to the Court of Appeal of the State of California, Third District whose decision was filed on December 5, 1980 and from which the current appeal lies. The Supreme Court of the State of California denied hearing on February 18, 1981.

## QUESTIONS PRESENTED

(1) Whether the automatic resignation of appellant pursuant to section 19503 of the California Government Code constituted a governmental "deprivation" or "taking" of property under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

(2) Whether, even if appellant's automatic resignation constituted governmental action for the purposes of the Due Process Clause, appellant was afforded adequate procedural due process in the form of his post-termination evidentiary hearing.

(3) Whether California Government Code section 19503 violates substantive due process.

## MOTION TO DISMISS

The appellees hereby move to dismiss the appeal on the ground that the questions presented by appellant are not of a substantial nature.

## MOTION TO AFFIRM

Alternatively, appellees move to affirm the judgment of the Court of Appeal of the State of California for the Third District that section 19503 of the California Government Code is not in any way violative of the Due Process Clause of the Constitution of the United States.

## ARGUMENT I

### THE AUTOMATIC RESIGNATION OF APPELLANT PURSUANT TO SECTION 19503 OF THE CALIFORNIA GOVERNMENT CODE DID NOT CONSTITUTE A GOVERNMENTAL "DEPRIVATION" OR "TAKING" OF PROPERTY UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

It was the holding in the decision from which this appeal derives that the act which severed the employment relationship of appellant and appellee State of California was appellant's own and not governmental action amounting to a "deprivation" or "taking" of property for due process purposes.

That holding was based on the rationale that the mechanism which terminated the employment relation-

ship was solely in the hands of appellant. It was he who absented himself for seven consecutive days without first obtaining one of the various forms of leave available to him. Certainly, as the court below pointed out, the appellant was on notice of the consequences of his absence. The Statute clearly stated that:

> "Absence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from State service, as of the last date on which the employee worked."
>
> The Court of Appeal held as follows:
>
> "When plaintiff voluntarily absented himself from work without leave for more than five consecutive days, such *self-abdicating* action triggered the constructive resignation provision. (See *Baker* v. *Wadsworth* (1970) 6 Cal.App.3d 253, 262–263.) It was plaintiff's own act, not the State's which severed the employment relationship. Consequently there was no governmental action which amounted to a "deprivation" or "taking" of property for due process purposes." (Cf. *Civil Service Assn.* v. *City and County of San Francisco* (1978) 22 Cal.3d 552, 569.) (Emphasis added.)

It is appellees' position that the Court of Appeal's decision was well-founded. As was explained in *Baker* v. *Wadsworth, supra,* 6 Cal.App.3d 253, an earlier Court of Appeal case, discharge or removal for cause is quite different from abandonment or constructive resignation. Compulsion is a "separate and distinct method" from "self-abdication." (*Baker* v. *Wadsworth, supra,* 6 Cal.App.3d 253, 262–263.) It is clear State action is not involved in the latter instance. Thus, the same proce-

dural requirements simply do not obtain.

Appellant argues that appellant's " 'self-abdication' of his job occurred only after two significant actions were taken by the State." The first of the alleged actions revolves around the State's supposed refusal to grant appellant's request for sick leave and subsequent refusal to convert the seven (7) days of absence without leave to some form of approved leave. In fact, the State could have pursued neither of the courses of action suggested by the appellant. Sick leave, by its very nature, is for someone who is "sick" which appellant admittedly was not.[1]

The appellant further misses the point when he speaks in terms of "converting" the absence without leave to vacation or leave without pay. As the Court of Appeal correctly pointed out, section 19503 of the Cali-

[1] Section 18100 of the California Government Code provides in pertinent part: "Each State officer or employee is entitled to such [sick] leave with pay, on the submission of satisfactory proof of the necessity for sick leave as provided by rule of the State Personnel Board." The pertinent Board rule is Rule 401 which provides as follows:

"401. Definitions. As used in this article, 'sick leave' means the necessary absence from duty of an employee because of:

"(a) Illness or injury.

"(b) Exposure to contagious disease.

"(c) Dental, eye, and other physical or medical examination or treatment by a licensed practitioner.

"(d) Required attendance, not to exceed five days in any calendar year, upon the employee's ill or injured mother, father, husband, wife, son, daughter, brother, or sister, or any person residing in the immediate household of the employee except servants, roomers, or roommates.

"(e) The death of a person related by blood, by adoption, or by marriage or any person residing in the immediate household of the employee. Each such absence shall not exceed five days."

Appellant fell under none of these categories.

fornia Government Code is mandatory, not discretionary, in nature. Once five (5) days of absence had occurred without any form of pre-arranged leave, the automatic resignation took effect. At that point the appellant was no longer an employee. His former employers had no power to do anything. Appellant's only recourse was as laid out by Statute and Board Rule.

Appellant further argues that the appointing power, appellant's employer General Services, had the discretion to reinstate appellant immediately under section 19140 of the California Government Code. Theoretically that is correct. Appellant, in his brief, however, quoted only a small portion of said section.[2]

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[2] The full text of section 19140 is as follows:

"In addition to reinstatement required under any other section, an appointing power may in his discretion, reinstate any person having probationary or permanent status who was separated from his position (a) by resignation, (b) by service retirement, (c) by termination from limited-term, temporary, career executive assignment, or exempt appointment, (d) under the provisions of Section 19503, or (e) without a break in continuity of state service to accept another civil service or exempt appointment.

"Such reinstatement shall be:

"(a) Subject to board rule;

"(b) Within three years unless the employee, other than members of the California Highway Patrol, has remained in state service without a break in the continuity of state service due to a permanent separation; and

"(c) To a vacant position

"(1) In the class vacated or from which separated, or

"(2) In a lower class in the same series, or

"(3) In a lower class in a related series requiring similar types of qualifications and knowledges and abilities, or

"(4) In another class having substantially similar duties, responsibilities, and qualifications, and substantially the same salary range.

"For reinstatement after separation, the time spent (a) in a position which is exempt from civil service or (b) as a temporary employee in another governmental agency engaged in a technical cooperation program under an agreement approved by the state or (c) in the recognized military service shall not be considered in computing the three-year period."

Section 19140 encompasses a wide range of former employees and provides for a mechanism by which an appointing power may reinstate said employees without resorting to the normal testing procedures and lists. This enables former employees who have already demonstrated an ability to pass the required test and to perform employment satisfactorily by having earned permanent employee status to reinstate with relative ease at the *discretion* of an appointing power. That appointing power may be either the former employer or another appointing power.

It is important to note that the matter is discretionary on the part of any appointing power. The Statute refers to large categories of former employees and certainly was not tailored primarily for employees separated under section 19503. The statute is designed for the convenience of the appointing powers. In the instant case appellee did not choose to exercise its discretion to reinstate appellant after the fact of his resignation. There was no testimony that this particular option was even discussed. It chose, instead, to allow appellant to pursue the remedies provided by Statute.

However, the key point to be made is that, again, it cannot be said that there was State action simply because the appellee, General Services, didn't immediately reinstate appellant. That non-act did not terminate the employment relationship. It had already been terminated. Section 19140 simply allows a rehiring at any time within three (3) years after the date of termination and is a *separate and distinct transaction* from the termination itself.

Finally, appellant alleges darkly that there exists a "large amount of hidden discretion" within the terms of section 19503. He states that many automatic resignations, like appellant's are in reality hidden disciplinary actions. That simply is not so. As will be discussed in greater detail in Argument II, the triggering mechanism of section 19503, absence without leave for a period of five (5) days, is straight-forward and clear-cut as opposed to disciplinary actions. Appellant alleges that the building manager stated that the matter could have been handled "differently" if it were the first time and "nobody else knew about it." It is interesting to note that the only assertion that such a conversation took place is contained in the testimony of appellant, himself, at the administrative hearing. He further testified that the alleged comment was "curious" to him and that even he didn't know what the building manager meant. (See Appendix.) The hearing officer made no finding of fact relative to that testimony so we have no way of telling whether the hearing officer found such testimony to be credible or lacking in credibility. (See Appellant's Appendix, p. 20a–25a.) Further, even had the building manager made such a statement, it would be irrelevant since it would not have been correct and his proposed action is not provided for by law!

Appellant has cited the New York case of *Johnson* v. *Director, Downstate Medical Center* (1976) 384 N.Y.S.2d 189 for the proposition that automatic resignation statutes are disguised means of disciplinary actions.

Despite whatever may occur within the State of New York, there was no evidence whatsoever at the administrative hearing that any such sham actions take place in California. We have simply appellant's conjecture and speculation set forth in his jurisdictional statement which cannot, appellees maintain, be used for any purpose.

## ARGUMENT II

### EVEN IF APPELLANT'S AUTOMATIC RESIGNATION CONSTITUTED GOVERNMENTAL ACTION FOR THE PURPOSES OF THE DUE PROCESS CLAUSE, APPELLANT WAS AFFORDED ADEQUATE PROCEDURAL DUE PROCESS IN THE FORM OF HIS POST-TERMINATION EVIDENTIARY HEARING

Appellant argues that the procedures such as those outlined in the California Supreme Court Case of *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194, requiring a pre-termination hearing should be applied to the factual situation presented in this case. That assertion is in error even if one were to accept the premise that both removals for cause and automatic terminations by resignation should be considered as State action. The distinction between the two can only be delineated by discussing *Skelly,* its antecedents from this Court and subsequent decisions by this Court and California Supreme Court.

*Skelly, supra,* was handed down in 1975 in response to *Arnett* v. *Kennedy* (1974) 416 U.S. 134. *Arnett* was a plurality opinion which upheld the constitutionality of a

federal statute and regulations thereunder which provided that a nonprobationary employee was entitled to 30 days advance written notice prior to removal, access to the material on which the notice is based, the opportunity to appear before the official vested with authority to make the removal sufficient in order to answer the charges against him, the receipt of notice of an adverse decision on or before its effective date and the right to appeal an adverse decision (pp. 143–144). The opinion of the plurality (consisting of Justices Rehnquist and Stewart and Chief Justice Burger) apparently found that the "property" interest in continued government employment was necessarily defined and limited in the statute. Justices Powell and Blackman, while agreeing that the pretermination procedures outlined above comported with constitutionally required due process, were of the opinion that the property right was rooted in the constitution itself (pp. 166–167). Further, the plurality seemed to suggest that a post-termination hearing would have been sufficient compliance with the Due Process Clause (p. 167). At least three cases have cited *Arnett* for this last proposition: *DiLuigi* v. *Kafkalas* (3rd Cir. 1978) 584 F.2d 22, 27, f. 7; *DeSalas* v. *Burgos* (1st Cir. 1979) 595 F.2d 81, 83; *Newman* v. *Board of Education of City School District of New York* (2d Cir. 1979) 594 F.2d 299, 304. Justice White opined that a pretermination hearing was required but not of an evidentiary nature; although he would require that the employee be allowed to answer the charges against him before an impartial hearing officer rather than the official vested

with the authority to make the removal decision (p. 202). Justices Douglas, Marshall and Brennan were of the opinion that the constitution required a preremoval evidentiary hearing (p. 206). From this authority the principles in *Skelly* were born.

*Arnett,* however, was not the final word of this Court on the issue of pretermination hearings. *Mathews* v. *Eldridge* (1976) 424 U.S. 319, was handed down several months subsequent to *Skelly, supra. Mathews* dealt with the termination of social security disability benefits. *Mathews* set forth a balancing test to be used in determining the type of termination procedures required:

> ". . . identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Mathews* v. *Eldrige, supra,* at p. 335.)

This balancing test has been since utilized by this Court and by the California Supreme Court. (*Ingraham* v. *Wright* (1977) 430 U.S. 651, 675; *Dixon* v. *Love* (1977) 431 U.S. 105, 112–113; *Civil Service Association* v. *City and County of San Francisco* (1978) 22 Cal.3d 552; *Mackey* v. *Montrym* (1979) 443 U.S. 1, 11.)

*Dixon* v. *Love, supra,* 431 U.S. 105, is the case from

which an analysis for the situation presented in the instant case should begin its focus. *Dixon* involved the Illinois Driver Licensing Law, and a regulation thereunder, which authorized the Secretary of Illinois to revoke the driver's license without preliminary hearing in the event the driver's license was otherwise suspended three times within a ten-year period. Under the statutory scheme, the former licensee was entitled to a full evidentiary hearing after a revocation within 20 days following his request therefor. This Court reversed the judgment of the district court which had held that the driver was entitled to a pretermination hearing. In so doing, the court utilized a balancing test from *Mathews* v. *Eldridge* as previously set forth herein. (*Bell* v. *Burson* (1971) 402 U.S. 535, had previously held that a driver's license was a property interest to be afforded due process in removal.) The court held "here the Secretary *commendably* sought to define the statutory standard narrowly by the use of his rule-making authority. The decision to use *objective* rules in this case *provides drivers with more precise notice* of what conduct will be sanctioned and promotes equality of treatment among similarly situated drivers" (p. 115). (Emphasis added.) Justice Stevens, joined by Justice Marshall, wrote in a concurring opinion that because appellee's license was subject to *mandatory* revocation, *no prior hearing was necessary.* (*Dixon, supra,* p. 117.)

The circumstances in *Dixon* are closely analogous to the instant case because of the clarity of the triggering conduct and the mandatory nature of the consequences.

(*Arnett,* on the other hand, stated that the nature of dismissals "for cause" and the infinite variety of factual situations giving rise to cause necessitate imprecise language. Obviously, dismissal "for cause" requires more specific notice to the employee when he has engaged in conduct considered by the employer to be "cause." *Arnett,* p. 161.)

This Court, itself, has indicated that the principles set forth in *Dixon* are to be applied to employment situations. In *Oregon State Penitentiary* v. *Hammer* (1977) 434 U.S. 945, a decision by the Oregon Supreme Court (*Hammer* v. *Oregon State Penitentiary* (1976) 276 Or. 651, 556 P.2d 1348) affording *Skelly*-type rights to a "tenured employee" was vacated and remanded to the Oregon Supreme Court to be reconsidered in light of *Dixon* v. *Love.* (See also *Civil Service Association, supra,* 22 Cal.3d 552, 561–562, fn. 3.) *"Hammer I"* (at 556 P.2d 1348, 1349), dealt with an employee who had been dismissed for excessive absenteeism due to physical injuries. There was no evidence of malingering. The Oregon Supreme Court held that a "classified" state employee must be notified of the charges against him as well as the proposed sanction, and he must also be given an opportunity to respond. As stated earlier, this Court granted certiorari, vacated the judgment and remanded the case for reconsideration in light of *Dixon* v. *Love.* The case was reconsidered by the Oregon Supreme Court in 1978. (*Hammer* v. *Oregon State Penitentiary* (1978) 583 P.2d 1136.) In *"Hammer II"* the court continued to hold that the employee, who had not been warned prior to dismis-

sal that the state was considering such an action, was entitled to pretermination notice of the charges and an opportunity to respond. The court continued:

> "Had Hammer's superiors established a *specific limit on absenteeism, beyond which additional absences would lead to automatic dismissal,* this case would be much closer to *Dixon.*" (*Hammer II* at p. 1138, emphasis added.)

*Hammer II* was also appealed to this Court. Certiorari was denied.

A second case significant to this question is *Regents of the University of Minnesota* v. *National Collegiate Athletic Asso.* (2nd Cir. 1977) 560 F.2d 352, which dealt with an act of the National Collegiate Athletic Association placing the University of Minnesota on indefinite probation for refusing to find certain athletes immediately ineligible after the discovery of certain infractions. The University attempted to argue that they had proceeded correctly in holding a prior hearing because the athletes were constitutionally entitled to pretermination due process even though there were restrictions requiring immediate ineligibility upon the violation of said restrictions and the violations were acknowledged. The Federal Court of Appeals held otherwise.

> "Although consideration of mitigating circumstances occurs only *after* a student-athlete is declared ineligible, the [initial] declaration of ineligibility itself necessarily follows a member institution's determination that an infraction has occurred. Due process is flexible and calls for such procedural protections as the particular situation demands. [Cita-

tion omitted.] On the facts here, it cannot seriously be maintained that the student-athletes were entitled to a consideration of mitigating circumstances prior to a declaration of ineligibility. See *Dixon* v. *Love,* 431 U.S. 105, 114, 97 S.Ct. 1723, 52 L.Ed.2d 172, fn. 10 (1977). Accordingly, the presence or absence of mitigating circumstances was irrelevant to University's task of determining whether or not the infractions had occurred." (*Regents, supra,* p. 368.)

The court further pointed out that as the *restrictions causing mandatory ineligibility were in effect at all times material,* neither the athlete nor the University could successfully maintain that the Association failed to give fair warning! (*Regents,* p. 370.) Further the court cited *Dixon* as follows:

"Since appellee does not dispute the factual basis for the Secretary's decision, he is really asserting the right to appear in person only to argue that the Secretary should show leniency and depart from his own regulations. Such an appearance might make the licensee feel that he has received more personal attention, but it would not serve to protect any substantive rights." (*Dixon* v. *Love, supra,* 431 U.S. at 113–114 and *Regents, supra,* at p. 371, fn. 32.)

The principles in the above-cited cases may be distilled and applied to the operation of section 19503 to show that it comports with constitutional requirements.

It appears relatively clear that the continued employment of a nonprobationary employee such as petitioner is a property interest within the meaning of at least the California Constitution. Therefore, any removal or "taking" *by the State* of such continued employment re-

quires procedural due process. The question then is raised as to whether section 19503 provided petitioner with due process as required constitutionally if it may be seriously maintained that the *State* "took" from appellant. Respondents urge that the answer is unequivocally affirmative.

As this Court has stated: "Due Process is flexible and calls for such procedural protections as the particular subject demands." *Morrissey* v. *Brewer* (1972) 408 U.S. 471, 481; *Mathews* v. *Eldridge, supra,* at p. 334.

Thus, given the property interest, we must look to other factors to be weighed in the particular circumstances as are presently before us. Two other factors, other than the type of property interest, to be considered in the *Mathews* balancing theory are the risk of erroneous deprivation of such interest and the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Regarding the former, section 19503 provides for a certain and swift effect after the occurrence of a very specific event. The event is not subject to interpretation. An employee is either absent without leave or he is not. It is extremely easy to determine. The person is either on the job or not. If he is not, he is either absent with *prearranged* leave or, if he has not been granted leave, he is absent without leave. This determination is factual and easily ascertainable on each day that it occurs. Section 19503 provides that if the absence without leave continues for five consecutive days, there is an automatic resignation.

Section 19503 is closely analogous to the situations in *Dixon* v. *Love,* and *Regents of the University of Minnesota* v. *National Collegiate* and the circumstances distinguished in *Hammer II.* (All *supra.*) Here the employee has clear notice of one type of behavior that will automatically result in his resignation. It is certainly different from punitive actions wherein an employee may not really be on notice as to what specific type of behavior warrants punitive action. For instance, section 19572 of the California Government Code allows punitive actions to be brought on the basis of "incompetency," "insubordination", "inefficiency," "inexcusable neglect of duty," "immorality," "discourteous treatment of the public or other employees" and "other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to his agency or his employment" as well as other infractions. These charges are necessarily broad to encompass a wide variety of behavior and are, thus, vague. It is only reasonable that the employee be given specific examples of the conduct contained in one of these types of charges. Because of the specificity of section 19503, however, there is no necessity for prior written notice. The notice is set out by statute. The conditions are clear and concise. The voluntary resignation at the conclusion of five days allows the State to move swiftly to fill a position. There is very little danger of erroneous decisions. Further, there is provision for reinstatement upon the showing of mitigating factors.

Certainly the circumstances triggering the automatic resignation in this case are much more precise than the highly disputable factual situations in *Barry* v. *Barchi* (1979) 443 U.S. 55, wherein it was also held that a summary suspension was proper without a *pre*-termination hearing. As this Court held in *Mackey, supra,* at p. 13:

> ". . . the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations." (See also *Greenholtz* v. *Nebraska Penal Inmates* (1979) 442 U.S. 1, 7.)

As stated earlier, the burden put on the State must also be considered. Ofttimes an AWOL will have left the area or for some reason be unreachable. To burden the State with giving notice to a missing employee before his employment may be terminated or his position filled is untenable. It would lead to a paralysis as to a position each time an AWOL occurred. The State must be free to fill vacant positions in order to accomplish that position's function. Further, section 19503 serves as a deterrence to illegal strike activity. Section 19503 allows the State to rapidly refill positions in the event such activity takes place. The State is thus prevented from being immobilized. The burden should properly be placed on the employee who alone knows the reasons for his absences and failure to obtain leave.

An employee is protected by the right to a hearing wherein mitigating factors may be brought forward to justify a reinstatement. This procedural protection is virtually identical to the procedures in *Dixon* v. *Love* and *Regents of the University of Minnesota* v. *National Collegiate.*

In conclusion, section 19503 provides adequate procedural protection in its operation. Appellant has long been afforded notice and was afforded a prompt hearing after his mandatory and automatic resignation.

## ARGUMENT III

## CALIFORNIA GOVERNMENT CODE SECTION 19503 DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS

Appellees maintain that the court below was correct in its assessment that the State Legislature could reasonably conclude that a voluntary absence without leave for five (5) consecutive working days justifies a finding of constructive resignation. The court simply is in accord with this Court in its decisions in *Dixon* v. *Love, supra,* and *Mackey* v. *Montrym, supra.*

## CONCLUSION

For the foregoing reasons, appellees respectfully request that the decision of the Court of Appeal of the State of California for the Third District be either dismissed or affirmed.

Dated: JUL 17 1981

GEORGE DEUKMEJIAN
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# APPENDIX

Excerpt from the Reporter's Transcript of the State Personnel Board Hearing Conducted May 22, 1978, p. 21.

A (Mr. Willson) One thing in my discussion there with Mr. McKisson that kind of stuck in my mind and was curious to me, he said over a couple of times, "If this was the first time and nobody else knew about it, we could handle it differently." I didn't know what that meant because I had stipulated that I would be glad to take the time off without pay just as dock time or just vacation however they wanted to do it I wanted to make it right as far as the State went, as far as morally what was the correct thing to do.